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Nos. 95-1425 and 95-1460

In the Supreme Court of the United States October Term, 1995

LUCIOUS ABRAMS, JR., *et al.* and
THE UNITED STATES OF AMERICA,
Appellants,
v.
ZELL MILLER, *et al.*,
Appellees,
and
DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of appellees, Zell Miller, *et al.*, and Davida Johnson, *et al.* Consent to the filing of this brief has been granted by counsel for appellants Abrams, for the United States, and for the Georgia State appellants Miller, Howard, and Massey. Those letters of consent have been lodged with the Clerk of this Court. Counsel

for appellant Murphy has failed to respond to requests for consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Lopez v. Monterey County, California*, Docket No. 95-1201; *Bush v. Vera*, 116 S. Ct. 1941, 1996 WL 315857 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894, 1996 WL 315870 (1996); *Louisiana v. Hays*, ___ U.S. ___, 115 S. Ct. 2431 (1995); Adarand v. Pena, __U.S.__, 115 S. Ct. 2097 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true of congressional districts gerrymandered on the basis of race. PLF also believes that appellants' interpretation of the Voting Rights Act would unconstitutionally require racially proportional representation in redistricting and that if the only possible interpretation of

the Voting Rights Act does require racially proportional representation, the Act itself must be struck down as unconstitutional. These points may not be adequately covered by the parties whose interests are necessarily directed toward the particular districts at issue. PLF, with its extensive experience briefing the broader implications of the Voting Rights Act, is uniquely situated to analyze the issues involved in this case and to bring a wider scope of policy considerations to this Court.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: August 2, 1996.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Zell Miller, *et al.*, and Davida Johnson, *et al.* As noted in the accompanying motion, all parties but one have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

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PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. This is particularly true of congressional districts gerrymandered on the basis of race.

OPINION BELOW

The opinion of the Southern District of Georgia, drawing congressional district lines without resort to racial

gerrymandering, is reported at *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995).

STATEMENT OF THE CASE

This case is the fourth in a set of cases beginning in 1994 relating to Georgia's congressional districting scheme. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (*Johnson I*) struck down Georgia's Eleventh Congressional District as unconstitutional. This Court affirmed that decision in *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475 (1995) (*Johnson II*) and remanded. The plaintiffs then added some new plaintiffs from the Second Congressional District and the District Court declared that district unconstitutional as well. *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995) (*Johnson III*). Finally, the case which is the subject of this appeal is the remand decision from *Johnson II*, in which the District Court redrew the Georgia Congressional District map. *Johnson v. Miller*, 922 F. Supp. 1556 (*Johnson IV*).

Section 5 of the Voting Rights Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U.S.C. § 1973(c). The preclearance mechanism applies to congressional redistricting plans, *Beer v. United States*, 425 U.S. 130, 133 (1976), and requires that the proposed change "not have the purpose and ... not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c). "[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Between 1980 and 1990, one of

Georgia's 10 congressional districts was a majority-black district. After the 1990 census, however, Georgia was allotted an additional congressional district. *Johnson II*, 115 S. Ct. at 2483.

The additional district required the Georgia Legislature to redraw the state's congressional districts. Twice the Legislature submitted maps to the Department of Justice (DOJ) for preclearance, each map containing two majority-black districts. Each time, the DOJ rejected the plans, relying instead on a map drawn by the American Civil Liberties Union (ACLU) which would create three majority-black districts. Because Georgia's black population outside Atlanta is widely dispersed, the ACLU plan contained racial gerrymandering of the worst sort. Nonetheless, the DOJ, following its "max-black" policy, demanded that the Georgia Legislature accept the ACLU plan. *Johnson II*, 115 S. Ct. at 2483-84.

Thus coerced, the Georgia Legislature capitulated, enacting the ACLU plan with only minor modifications. Among its other deficiencies,

> [t]he populations of the Eleventh [District] are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors.
>
> The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending

> from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way.

Johnson II, 115 S. Ct. at 2484. Nevertheless, the plan was precleared and elections held. *Id.* Subsequently, white voters in the Eleventh District sued to have the district struck down as a racial gerrymander. On appeal, this Court found the racial gerrymander violated the Fourteenth Amendment equal protection guarantee. *Johnson II*, 115 S. Ct. at 2486. This Court held that race was the predominant force guiding the redistricting and that the DOJ's "max-black" agenda was not a compelling state interest sufficient to justify such racial gerrymandering under strict scrutiny. This Court specifically repudiated the DOJ's interpretation of the Voting Rights Act as requiring as many minority-majority districts as could possibly be contrived. *Johnson II*, 115 S. Ct. at 2491. The Court then remanded the case back to the District Court (*id.* at 2494), which, in turn, asked the Georgia Legislature to come up with a new, constitutional, plan. *Johnson IV*, 922 F. Supp. at 1559.

The Georgia Legislature failed to draw a new map, so the task fell back to the court. *Id.* The District Court drew up a map which contained that same single majority-minority district in Atlanta that had always existed and declined to create any other majority-minority districts in the state. *Johnson IV*, 922 F. Supp. at 1566. The court was guided by the need to (1) comply with one-person-one-vote requirements; (2) keep counties and precincts intact as much as possible; and (3) keep core communities of interest together. The court was not particularly concerned with protecting incumbents or other political concerns. The court further determined that its plan did not contravene the Voting Rights Act requirements. *Johnson IV*, 922 F. Supp. at 1566-67.

Black voters appealed the plan to this Court, which noted probable jurisdiction on May 20, 1996.

SUMMARY OF ARGUMENT

Appellants seek a reversal of the decision below on an interpretation of the Voting Rights Act which would unconstitutionally require racially proportional representation in redistricting. The court below correctly rejected such an interpretation of the Act. The Act originally was aimed only at discriminatory voting procedures which denied blacks the right to cast their ballots. Although the 1982 amendments to the Act included those procedures which had racially discriminatory "results" (but not necessarily "intent"), it explicitly repudiated proportional representation by race. However, the appellants would require an interpretation of the Act requiring proportional representation. Thus, this Court should affirm the District Court's opinion which properly drew congressional districts in a nondiscriminatory manner and which repudiated appellants' attempts to impose proportional representation on the Georgia electorate.

Alternatively, if this Court holds that the Act, as currently written, cannot be interpreted in any way other than to require such proportional representation, the Act itself must be struck down as unconstitutional. Mandated proportional representation is equivalent to the strict racial quota systems found by this Court to be abhorrent to the Constitution. It segregates individuals into racial clans, inhibiting the democratic tenets of coalition and compromise. Proportional representation fosters politicians who represent races rather than constituents and prevents broad-based minority power by limiting their influence to a few "majority-minority" districts. Finally, proportional representation makes the patently false and pernicious assumption that

all minorities think alike and that only a minority can properly represent minority interests.

ARGUMENT

I

APPELLANTS' INTERPRETATION OF THE VOTING RIGHTS ACT WOULD UNCONSTITUTIONALLY REQUIRE RACIALLY PROPORTIONAL REPRESENTATION IN REDISTRICTING

In 1964, Dr. Martin Luther King proclaimed that "[o]nly with the growth of an enlightened electorate, white and Negro together, can we put a quick end to this century-old stranglehold of a [racist] minority on the nation's legislative processes." M. King, WHY WE CAN'T WAIT 149-50 (1964). Dr. King's words became legislative action less than a year later with the passage of the Voting Rights Act. "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men," proclaimed President Lyndon Johnson upon signing the Act into law. S. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics*, 3-4 (1985).

A. Original Intent of the Voting Rights Act

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Board of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). Section 2 of the Act was largely uncontroversial and was seen only as a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980). Pursuant to

this constitutional power, the statute was aimed at discriminatory voting procedures which continued to deprive blacks of access to the ballot, such as literacy tests and "grandfather clauses." *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Then Attorney General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure ... from ordinary concepts of our federal system," *Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its *limited* scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g., City of Mobile*, 446 U.S. at 60-61.

Three decades later, "the gradual workings of the original law" have been remarkably successful in meeting its goals: "the enrollment of minority voters, the large-scale entry of minority voters into the rank and file of the political parties, the entry of minority candidates into politics, and a growing receptiveness of a predominantly white electorate to minority candidates." T. O'Rourke, *The Voting Rights Paradox* in CONTROVERSIES IN MINORITY VOTING 109 (Grofman & Davidson, eds., 1992) (Paradox); *see also Holder v. Hall*, __U.S.__114 S. Ct. 2581, 2593 (1994) (Thomas, J., concurring in the judgment).[1]

---

[1] Blacks who have won elections with white support include Douglas Wilder, lieutenant governor and later governor of Virginia; David Dinkins, mayor of New York City; and

(continued...)

The Act, however, did not and could not reach vote "dilution" and, in particular, racial gerrymandering claims. *Holder*, 114 S. Ct. at 2593-94 (Thomas, J., concurring in the judgment). Drawing district lines must be distinguished from the basic process of allowing a citizen to vote: registering, casting a ballot, and having it counted. *Id.* at 2603. This dichotomy reflects the different bases of the different types of claims. As noted, the Act derived from the Fifteenth Amendment, while gerrymandering claims are cognizable

---

[1] (...continued)
Norm Rice, mayor of Seattle. Senator Edward Brooke's victory in 1966 was a harbinger for the elections to Congress of other blacks from majority-white constituencies. George Collins was elected in 1970 from a 42% black Chicago district and Ronald Dellums was elected for a 70% white district. Minorities continued to be elected thereafter. For example, Andrew Young (1972), Harold Ford (1974), Alan Wheat (1982), Katie Hall (1982), and Gary Franks (1990) were all elected from majority-white districts. Moreover, the latter group of districts differed from the traditionally liberal constituencies in Massachusetts and Berkeley, California, that sent Brooke and Dellums to Washington. Since the early 1970s a much larger group of black representatives--Barbara Jordan (1972), Julian Dixon (1978), Mickey Leland (1978), Mervyn Dymally (1980), Floyd Flake (1986), and Craig Washington (1989)--have been elected in districts where no racial group constitutes a voting-age majority. Others, such as William Clay (1968) and Charles Rangel (1970), held their seats as their majority black constituencies became either majority-white or became a plurality. By 1988, 39% of the blacks in Congress represented districts that were less than 50% black. Swain, *Some Consequences of the Voting Rights Act*, in B. Grofman and C. Davidson, CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (The Brookings Institution) at 293 n.20 (1992).

only under the Fourteenth Amendment. *See Voinovich v. Quilter*, 507 U.S. 146 (1993); *Beer v. United States*, 425 U.S. at 142-43 n.14.

Furthermore, the Act, in its original and amended form, did not call for proportional racial representation. In fact, it explicitly disavowed any such intent: "[N]othing in this section established a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). Members of this Court have recognized this prohibition both before and after the 1982 amendments to the Act. *See, e.g., City of Mobile*, 446 U.S. at 65 (opinion of Justice Stewart for the Court); *Holder*, 114 S. Ct. at 2597 (Thomas, J., concurring in the judgment). The Act simply was not intended or expected to create proportional representation by race.

B. Executive and Legislative Branches of Government Have Interpreted and Applied the Act to Require Unconstitutional Racial Representation

The interpretation of the Voting Rights Act advocated by the appellants in this case and rejected by the court below directly contravenes the Act's legislative language and calls for proportional racial representation. This interpretation is grounded on a 25-year history (1968-1993) of legislative, executive, and judicial pronouncements encouraging proportional representation. As this Court has recently held in *Shaw v. Reno*, 509 U.S. 630, this old interpretation is incorrect.

First, no fewer than six justices of this Court have recognized that the pre-*Shaw* and *Johnson II* interpretation of the Act creates proportional representation. In *Thornburg v. Gingles*, 478 U.S. 30, 97 (1986), Justice O'Connor, joined by Chief Justice Burger, and Justices Rehnquist and Powell stated that through its interpretation, "the Court is requiring a form of proportional representation. *Id.* at 85, 91. In

Holder, Justice Thomas and Justice Scalia agreed that the Act as interpreted and applied requires proportional racial representation. 114 S. Ct. at 2598-600 (Thomas, J., concurring in the judgment). Whether expressly stated by present and former members of the Court or "hidden" within the morass labeled "totality of the circumstances," *see* A. Thernstrom, WHOSE VOTES COUNT? 127 (Harvard University Press, 1987) (Thernstrom), the logical extension of the Act as interpreted is racial proportionality in elections.

Second, experts and legislators at the time of the 1982 amendments to the Voting Rights Act believed that racial proportionality would result. According to Duke Law Professor Donald Horowitz, "[t]he only way to judge the effect [of a redistricting scheme] will be to see whether minority voters have representatives in proportion to their population in that jurisdiction." *Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 1309 (1982) (Senate Hearings); *see also id.* at 1340 (testimony of Professor James Blumstein). Some congressional witnesses were less methodical in their approach but came to the same conclusion: "South Carolina's population is approximately 30 percent black, and 30 percent of the senate should be black," argued Dr. Willie Gibson, president of the NAACP Conference for South Carolina. *Id.* at 252; *see also id.* at 253 (statement of Jesse Jackson).

Third, the Department of Justice has independently determined that the Act requires proportional representation. For example, a Justice Department memorandum on Barbour County, Alabama, candidly argued that "[s]ince blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts, that is two viable districts plus a third district in which their interests must be taken into account even though they cannot control the election."

Thernstrom at 171-72, *see also id.* at 179. The DOJ has pursued an aggressive campaign to bludgeon state governments into compliance with its interpretation of the Act. This Court held in *Johnson II*, 115 S. Ct. at 2484, that the plan adopted by the Georgia state legislature "bore all the signs of [the Justice Department's] involvement," gouging out black populations and connecting them "by the narrowest of land bridges." (Internal citations omitted). The Justice Department demanded race-based revisions to Georgia's redistricting plans, and the state legislature eventually acquiesced. *Id.* In response, however, this Court affirmed the District Court's invalidation of the plan, concluding that "the Justice Department's implicit command [was] that States engage in presumptively unconstitutional race-based districting." *Id.* at 2493. Despite this firm rejection of the DOJ's position, the DOJ returns in this very same case to again advocate its vision of proportional representation.

It is no wonder that, prior to the very recent holdings of this Court, states seeking to avoid harassment and threats from the Department of Justice gerrymandered electoral districts according to race. *See generally Shaw v. Hunt*, 1996 WL 315870, *Bush v. Vera*, 1996 WL 315857, and *Johnson II*, 115 S. Ct. 2475 (each case striking down racially gerrymandered congressional districts). Justice Kennedy, concurring in *Johnson v. De Grandy*, 512 U.S.__, 114 S. Ct. 2647, 2666 (1994) (Kennedy, J., concurring in part and concurring in the judgment), correctly foresaw the results of the DOJ's interpretation of the Act:

> States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 [of the Act] litigation. Likewise, a court finding a § 2 violation might believe that the only appropriate remedy is to order the offending

> State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under § 5 of the Act, ... to a State's proposed legislative redistricting.

Johnson v. De Grandy, 512 S. Ct. at 2666.

The interpretation of the Act, by the Department of Justice and other appellants herein, is that redistricting must create racial proportionality.

This interpretation unconstitutionally requires the creation of racially proportional legislative districts. Originally, the intent of the Act was to ensure nondiscriminatory access to the ballot, *i.e.*, prohibiting literacy tests and other discriminatory prerequisites for voting. *See Allen v. State Board of Elections*, 393 U.S. at 582-94 (Harlan, J., dissenting). As such, it was a valid exercise of the Fifteenth Amendment's remedial powers and was "constitutionally valid as interpreted and as applied." *Shaw*, 509 U.S. at 654. But "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must "'consist with the letter and spirit of the constitution.'" *Miller*, 115 S. Ct. at 2493 (internal citation omitted). The Voting Rights Act is not an all-purpose weapon to be used by social engineers in the pursuit of their concept of utopia. *See Presley v. Etowah County Commission*, 502 U.S. 491, 509 (1992); *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

C. Recent Judicial Decisions Forbidding Reliance on generalized Societal Ills to Justify Racial Classifications Apply in Equal Force to Congressional Districting

There is no legal justification for racial segregation in redistricting, *i.e.*, there is no compelling state interest that

would allow this type of racial classification to survive strict scrutiny. *Shaw* and *Miller* settled the doctrinal issue that the race discrimination paradigm applies in the voting area as it does in every other area of our collective life. The modern paradigm originated in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was decided as an education case. It was subsequently applied to all public facilities, but this Court did not write an opinion to explain why. The holding in *Brown* extended to public beaches, public golf courses, and every public facility.[2] But this Court decided the post-*Brown* decisions on a per curiam basis, leaving the rationale unarticulated.

The basic principle reinforced in *Shaw* and *Miller* is that *Brown* applies not only to very important things like education, but also to the use of bathrooms and water fountains. It is not the nature of the benefit or the subject matter that controls. The nature of the classification, namely race, is key. If race is used by government, strict scrutiny applies. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 503-04 (1995). The only possible remedy when a governmental entity racially gerrymanders is to replace it with a race-neutral districting scheme. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 186 (Burger, C.J., dissenting) (internal citation omitted).

Only one governmental interest can justify racial classifications under strict scrutiny: remedying the present

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[2] *See, e.g., Gayle v. Browder*, 352 U.S. 903 (1956), *rehearing denied*, 352 U.S. 950 (transportation); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Muir v. Louisville Park Theatrical Assoc.*, 347 U.S. 971 (1954) (parks).

effects of identified past illegal discrimination by a particular government entity. *See Adarand v. Pena*, 115 S. Ct. at 2113; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring in the judgment); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); *Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2579 (1996). This "remedy rationale" might be appropriate in the context of governmental hiring and contracting: A minority *individual* may have been denied the opportunity to compete for government employment or contracts because of his or her race and, by giving that *individual* a preference in the hiring/contracting process, an employer compensates that *individual* for a past opportunity denied.

This rationale, however, cannot square with the conditions of voting and redistricting. There are no residual losses from "bad" elections and redistricting schemes of the past: By properly redistricting, a governmental entity (or court) cleans the slate. The fact that a previous group of legislators invidiously gerrymandered by race after a previous census has absolutely nothing to do with the present redistricting process--either the new plan is race-neutral and must be deferred to, or it segregates individuals by race and must be struck down as unconstitutional. There simply is no grey area in redistricting. By creating "majority-minority districts," or "minority influence districts," or any other form of "racial borough," "[n]o old injustice is undone, but a new injustice is inflicted." R. Bork, *The Tempting of America* 106 (The Free Press, 1990); *see also* T. Sowell, CIVIL RIGHTS: RHETORIC OR REALITY 119 (1984). The court below properly recognized that the only constitutional response to racial gerrymandering is to replace it with race-neutral redistricting. If, however, this Court should hold that the appellants are correct that the Voting Rights Act requires proportional representation, then the Act violates all the

tenets of equal protection set forth above. The only recourse, if this Court cannot interpret the Act in any other way than appellants advocate, is to strike down the Act itself as unconstitutional.

II

REQUIRED RACIAL PROPORTIONALITY IS FUNDAMENTALLY OPPOSED TO AMERICAN PRINCIPLES OF GOVERNMENT

A construction of the Voting Rights Act which requires racial proportionality in redistricting is fundamentally opposed to American principles of government. It is no different than the strict quota systems in governmental hiring and contracting. *See, e.g., Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (a strict quota system under a different label is still a quota system); *Regents of University of California v. Bakke*, 438 U.S. 265, 288-89 (1978) (same). Under a strict racial quota theory, the number of representatives from a particular racial heritage should mirror the percentage of the population with the same heritage. Strict racial quotas, however, have been found by this Court to be abhorrent to the Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. at 499-508; *Bakke*, 438 U.S. at 307-11, 315-19 (opinion of Justice Powell); *Adarand v. Pena*, 115 S. Ct. at 2113. In its effects, however, the racial quota epitomized in proportional redistricting is even more invidious and destructive of American democracy than strict employment and contracting quotas: "Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright v. Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting).

There are five reasons why racial gerrymandering to achieve racial proportionality violates American principles of government. First, dividing voters by race divides

communities and places undue emphasis on defining the parameters of the characteristic of division. Second, racial gerrymanders encourage the representatives elected from those districts to respond only to the concerns of the racial group which elected them, to the detriment of the "filler" voters in the district. Third, corralling members of a particular racial group into a limited number of districts prevents those individuals from exerting any influence in the districts from which they have been excluded. Fourth, racial gerrymandering and racial proportionality are based on the assumptions and stereotypes that race is the single most important factor in determining a person's political philosophy or voting priorities. Fifth, our Nation has a long history of determining the composition of representative bodies on the basis of geography. To permit a single interest group, if indeed a racial group can be so designated, a proportional designation of seats in a legislature, exalts race over every other interest group which is constrained in its influence by the geographical boundaries in which it is located. Each of these reasons is discussed in turn below.

A. Districting By Race Divides Communities

First, racially proportional redistricting "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan. ... [T]hat system is at war with the democratic ideal."

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," obviate the need to form coalitions and seek compromise--two of the most heralded features of American government. Senate Hearings at 1449 (statement of Professor William Van Alstyne). "Safe minority districts," like the white gerrymandered districts of the past, obstruct voters or candidates from building bridges between racial groups and from forming voting coalitions that transcend skin color. *Holder,* 114 S. Ct. at 2599 (Thomas, J., concurring). "[D]emocratic choice and democratic institutions require a fluidity and freedom that are at odds with the concept of labeling citizens for political purposes on the basis of race or ethnicity." Thernstrom at 124. The Voting Rights Act, "a statute meant to hasten the waning of racism in American politics," *De Grandy,* 114 S. Ct. at 2661, thus becomes a tool of division rather than integration.

There is the corollary problem created when government tries to determine who fits into various categories. Already, there have been heated debates over the definition of census categories. For example, should the children of black and white unions be designated separately or subsumed under the category of African-American? Is "Hispanic" a coherent category or should national subgroups be separately identified? Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 901 (1995), citing Epstein, *Note: Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 535-61 (1995) (describing pressure that civil rights enforcement has placed on the Equal Employment Opportunity Commission and courts to define racial categories). The act of assigning representation on the basis of what state authorities determine to be the defining feature of a citizen's existence is necessarily problematic. *Id.* at 903. By refusing to categorize individuals on the basis of immutable and

irrelevant characteristics, the government (and the court below) avoids this thorny issue entirely.

B. Districting By Race Encourages Representatives to Respond to Those of the Same Race While Dismissing Concerns of Electors of a Difference Race

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *United States v. Dallas County Commission*, 850 F.2d 1433, 1444 (11th Cir.) (Hill, J., concurring), *cert. denied* 490 U.S. 1030 (1989). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Senate Hearings at 1327-28 (testimony of Professor Horowitz). Race relations suffer when electoral remedies favor one minority group or create environments in which candidates can engage in racially or ethnically polarizing tactics without fear of defeat. This is true whether one is discussing former Klansman David Duke, whose racist statements garnered him 55% of the white vote in his 1991 gubernatorial race in Louisiana, or Chicago's Gus Savage, whose rampant anti-Semitism apparently cost him few black votes. Swain at 295.

The right to vote should have a single meaning--one that recognizes the values the right protects and the functions it serves in a democratic society. That value comes not from proportional representation. Rather, it comes from the ability to join together with others to make one's numbers felt in the political process and, therefore, in societal decision-making. It comes from being able to form alliances

to further common goals. In short, it comes from being able to participate in the "pluralist bazaar of politics." Butler, *Denial or Abridgment of the Right to Vote: What Does It Mean?*, in L. Foster, ed., THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS at 57 (1985).

C. Districting By Race Assumes that Minorities Would Rather Have Overwhelming Control of One District Than Influence Over Several Districts

Third, a state-imposed racial gerrymander assumes that, given a choice, black voters would not choose to exercise broader influence over a number of competitive districts. One of the obvious effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and, consequently, ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History* 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pole); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 96 (Basic Books, Inc., N.Y., 1987).

"'I am bitterly opposed to any effort to resegregate me ...,' a black judge in Norfolk, Virginia, testified at a voting rights trial. 'How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community? Political power is not merely symbolic.'" Thernstrom at 244. Without the divisive force of racial reapportionment, politicians are forced to weld together multiracial coalitions. Democrats and Republicans, of all races, regularly owe their

election to minority support. Even separatists of the past, such as Dixiecrat politicians Strom Thurmond and George Wallace, have sought minority support out of political necessity and thus have been forced to address the concerns of *all* constituents, regardless of race. *Id.* at 234, 241. Such coalitions exemplify the American political tradition.

D. Districting By Race Assumes that Race Is the Crucial Factor to Determine Individuals' Political Philosophy and Voting Priorities

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. Racial gerrymandering causes injury based on the classification itself. The precise injury suffered by those on whom racial gerrymandering falls is not vote dilution, but rather the subjection to race-based decision-making. For white voters the injury is being stigmatized by the assumption that they are so prejudiced that black voters need government protection from them. White voters are injured by the assumption that one's black neighbors have a greater community of representational interests with black voters hundreds of miles away than they have with the people in the community where they live and work. For black voters, the injury is being subjected to the assumption that skin color primarily defines representational interests. Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights (Affirmative Racial Gerrymandering)*, 26 RUTGERS L.J. 595, 610 (1995).

This Court has held that racial gerrymandering "reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the

same political interests, and will prefer the same candidates at the polls." *Shaw*, 509 U.S. 630, 647 (1996). In fact, "[b]y perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.*

Recently, Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 114 S. Ct. at 2599 (Thomas, J., concurring).

Race cannot be used as a proxy. It may be, as an empirical matter, that in a certain political situation "black" Democrats are a good proxy for "loyal" Democrats, but that type of racial proxy will not be acceptable. Democrats, black and white, can be districted into an incumbent's district to solidify a base of support, but race cannot be used as a proxy for loyalty, or disloyalty, to a particular party. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy.... We may not accept as a defense to racial discrimination the very stereotype the law condemns"). This is the kind of stereotypical approach and attitude that the Court has condemned in all the racial gerrymander cases. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. at 512-13 (1995).

Appellants make the faulty assumption that all white voters are fungible. Thus, if majority white districts are a greater percentage of all districts than whites are of the electorate, whites are "over represented" and minorities are "under represented." To appellants, all districts that are majority white are created for whites, thereby, "fairness"

dictates that some districts be created for blacks. Even if it is accurate to characterize blacks and other minorities as groups who see their political interest as tied to the election of candidates from within the group, it is inappropriate to view "whites" as the political group with which minorities compete for political influence in the districting process. White voters are not a monolithic group whose primary political goal is to elect white officials. White voters are splintered in many competing political factions designated either by party (*e.g.*, Republican, Democrat, Libertarian, Reform) or by concentration on a single issue (*e.g.*, environmentalists, right-to-lifers). Moreover, districts are seldom created "for" white voters. Most districts contain a majority of white voters because whites are a majority of the population. Inevitably, when districts are geographically compact and respect political boundaries, most will be majority white. Indeed, if there were more "naturally occurring" majority-minority districts, legislators would not have resorted to drawing bizarre ones. Butler, *Affirmative Racial Gerrymandering* 26 RUTGERS L.J. at 617-18. Blacks are not likely to become a numerical majority in America anytime soon. If, however, race ceases to be a basis for minority treatment, if African ancestry brings no greater benefits or burdens than European ancestry, the numbers of blacks or other minorities in particular fields becomes irrelevant. While we cannot effectively mandate that individuals look beyond race, we increase the chances that race will matter less if we, as a government, steadfastly reject measures that affect individuals, positively or negatively, based on their membership in an immutable group. *Affirmative Racial Gerrymandering*, 26 RUTGERS L.J. at 599.

E. Geography Is the Long Standing Neutral Principle of American Congressional Districts

The Founding Fathers valued the faction-diluting character of representation by place. Rather than representation by wealth, by profession, or any other principle of organization which would define in advance the kinds of interests that would be admitted to the game of politics, the authors of the Constitution deliberately chose geographical representation. They believed this principle possessed a randomizing effect on the make-up of the voting public. Polsby and Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. AND POL. REV. 301, 307 n.29 (1991) (*Third Criterion*). Thus, for example, when Alexander Hamilton argued in the Federalist Papers that the "wealthy and the well-born"--a faction--would not come to dominate the legislature through abuse of the voting process, he asked:

> Are the wealthy and the well-born, as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct of foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors?

The Federalist No. 60 at 370-71 (A. Hamilton) (Rossiter, ed. 1961). A gerrymander defeats this randomizing effect by picking and choosing the factions which will exist within particular boundaries.

Thus, geography is the basis upon which representation is assigned. In many other democracies, seats are assigned to competing political parties on the basis of their share of

the vote. *See generally*, P. Norton, THE BRITISH POLITY 99-101 (1984) (describing various types of proportional representation in the United Kingdom, West Germany, and Italy). In these proportional representation systems, groups with limited political agendas may be directly represented in the legislative body by a party organized specifically to further the groups' purposes. *Id.* In the United States, however, all groups must further their political interests within the confines of a representational system based on geographically constructed, winner-take-all, districts. Therefore, environmentally oriented voters will be represented in the legislative body by the representatives elected from their geographically based districts--representatives for whom the environment will be but a single item on their legislative agenda. Similarly, Democrats who deliver 49% of a district's vote for the Democratic nominee will nevertheless be represented by the Republican who received 51% of the vote. Gerrymandered, race-based districts are an attempt to provide direct interest group representation to minorities. To recognize minorities as a community of interest within the confines of geographically based districts affords minorities the same treatment as other geographically concentrated interest groups with sufficient political clout to demand a district. However, the creation of minority districts by extreme gerrymandering frees minorities, and only minorities, from the constraints that a geographically based representational scheme places on other interest groups. *Affirmative Racial Gerrymandering* 26 RUTGERS L.J. at 620-21.

CONCLUSION

The national habit of counting by race is more difficult to eradicate than it was to instill. It is easier to confer an entitlement, or to inspire a claim to one, than to withdraw it.

Yet, this Court, in its Voting Rights Act decisions of the past few years, has sought to deflect the otherwise irreversible tendency toward the convenient and destructive practice of allocating resources, including representation in our national legislature, by racial groups. As this Court noted in *Bush v. Vera*, 1996 WL at *20, legislatures and district courts nationwide have reembraced the traditional districting practices that were almost universally followed before the 1990 census in response to the *Shaw v. Reno* decision. Those practices and Supreme Court jurisprudence acknowledge voters as more than mere racial statistics which play an important role in defining the political identity of the American voter. *Id.* The court below followed the dictates of this Court that racial gerrymandering is unconstitutional. The District Court's drawing of Georgia's congressional District Lines adheres to the traditional districting principles endorsed by this Court and should be affirmed.

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Respectfully submitted,

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